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Supreme Court of the United States

October Term, 1994

IN THE MATTER

OF

RONALD R. BENJAMIN an Attorney and Counselor-at-Law

RONALD R. BENJAMIN,

Petitioner,

against

COMMITTEE ON PROFESSIONAL STANDARDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

Whether or not public censure of an attorney for making legal arguments and assertions warranted by both the facts and the existing law violates and chills his exercise of limited first amendment speech available for the purpose of vigorously advocating a client's reasonable position in a particular case?

Whether or not public censure would have an impermissible chilling effect, as well as deprive an attorney of his right to petition the government for redress of grievances, where the disciplinary process was admittedly initiated by a sitting judge who did so because counsel made a meritorious motion that said judge recuse himself based on judicial impropriety and personal bias, and where the subject matter of the disciplinary process was nothing more than words spoken in the context of earlier legal arguments made before the same judge who contemporaneous with the time the arguments were made did not express any belief that said arguments were in any way misleading or otherwise a subject for disciplinary action.

Parties to the Proceeding and Rule 28.1 Statement

The parties to the proceeding below were Petitioner Ronald R. Benjamin, and Respondent Committee on Professional Standards of the State of New York Supreme Court, Appellate Division, Third Judicial Department.

Neither the Petitioner nor the Respondent has any corporate affiliation to list under Rule 28.1.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN THE MATTER OF RONALD R. BENJAMIN, an Attorney and Counselor-at-Law

RONALD R. BENJAMIN,

Petitioner,

COMMITTEE ON PROFESSIONAL STANDARDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioner Ronald R. Benjamin respectfully prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals, entered in the above-entitled proceeding on December 22, 1994.

Opinions Below

There is no memorandum opinion of the New York Court of Appeals. The final order of the New York Court of Appeals dismissing the appeal is not yet reported, and is reprinted in the Appendix hereto, p. 1a, *infra*.

The order of the New York Court of Appeals dismissing the appeal petitioner took as of right, on the ground that no substantial constitutional issue was raised, is reported at 84 N.Y. 2d 863 (1994), and is reprinted in the Appendix hereto, p. 3a, *infra*.

The opinion of the State of New York Supreme Court, Appellate Division, Third Judicial Department is reported at *In Re Benjamin*, 129 A.D.2d 886, 613 N.Y.S.2d 960, 961 (3d Dept. 1994), and is reprinted in the Appendix hereto, p. 5a, *infra*.

Jurisdiction

The judgment of the State of New York Supreme Court, Appellate Division, Third Judicial Department, was decided and entered June 24, 1994.

A timely notice of appeal as of right to the New York Court of Appeals was dismissed on September 22, 1994, by its order *sua sponte* dismissing petitioner's appeal taken as of right on the ground it did not raise a substantial constitutional issue (*see* Appendix p. 3a, *infra*).

A timely motion to the New York Court of Appeals seeking discretionary review was summarily denied on December 22, 1994. (*see* Appendix, p. 1a, *infra*).

This petition for certiorari is filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

Statutes Involved

UNITED STATES CONSTITUTION:

First Amendment:

> Sec. 1: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE STATE OF NEW YORK SUPREME COURT APPELLATE DIVISIONS, PART 1200 OF TITLE 22 OF NEW YORK CODES, RULES AND REGULATIONS [NYCRR]:

22 NYCRR §1200.3(a)(4) [D.R. 1-102(a)(4)] Misconduct:

> (a) A lawyer shall not:
>
> ...
>
> (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

22 NYCRR §1200.33(a)(5) [D.R. 7-102(a)(5)] Representing a Client Within the Bounds of the Law:

> (a) In the representation of a client, a lawyer shall not:
>
> ...
>
> (5) Knowingly make a false statement of law or fact.

Statement of the Case

Petitioner is an attorney who has been publicly censured by the New York courts for misrepresentation and deceit on the basis of a legal argument he *did not make* and for an *accurate* sworn averment he made in the course of representing clients in court. No non-speech conduct was identified as the basis for the discipline. This can readily be verified because what petitioner actually argued and averred are *matters of written record contained in verbatim transcripts, an affidavit and other documentary evidence* that clearly and convincingly show no misrepresentations or other deceit by him occurred or were intended.

In its June 9, 1994 decision, the New York Supreme Court, Appellate Division, Third Judicial Department censured petitioner for violation of New York's Disciplinary Rule 1-102(a)(4), which prohibits "conduct involving dishonesty, fraud, deceit, or misrepresentation," on the basis he allegedly engaged in misrepresentation in the form of a "specious" legal argument in a divorce case in 1989 and an "inaccurate" averment in an affidavit in a wrongful death case in 1991. 5a, *infra*. Thus, he was censured on the basis of a charge that "should be reserved for conduct that is fraudulent . . . and generally warrants disbarment." *Matter of Altomerianos*, 160 N.Y.A.D.2d 96, 103 (1st Dept. 1990).

With all due deference to the Third Department, the conclusion that misrepresentations occurred is based, not on the actual legal arguments and averments petitioner made (which were both proper and warranted by existing law and fact), but on the erroneous, paraphrased versions thereof that appeared in the report of the referee who presided over the factfinding disciplinary hearing. 9a, *infra*. Indeed, the referee's findings and conclusions cannot be reconciled with the actual evidence adduced at the disciplinary hearing, and, consequently, petitioner is being disciplined for the referee's paraphrased version of the estoppel argument and the referee's failure to recognize that petitioner never admitted anything but that his sworn averment

was accurate. At a minimum, his statements were taken out of context in order to conclude they were "specious" and "inaccurate." Moreover, the respondent Committee on Professional Standards was not required to show that petitioner's conduct included any knowing or intentional misrepresentations, and rested its case merely on the assertion that petitioner made specious and inaccurate statements in the course of representing his clients.

Petitioner is in reality being punished for making a reasonable, but losing, estoppel argument and for drawing a reasonable, but losing, inference from his view of the operative facts in a contested motion. There was no charge that petitioner misrepresented factual events or miscited law, or similar conduct. Petitioner was charged with attempting to mislead the judge and opposing counsel who were presumably capable of protecting themselves from being misled by legal arguments and inferences. A charge of dishonesty should not have the general application it was given in this matter. In essence, the Third Department ruled a specious argument is by definition deceptive, and failed to provide any objective guidance to attorneys who must advocate for their clients without fear that a losing argument may result in disciplinary proceedings depending on such vagaries as the thickness of the skin or the skill of the judge and opposing counsel before whom the attorney is representing a client.

Petitioner specifically raised constitutional issues in the early stages of and throughout the proceeding. Yet, the Third Department and Court of Appeals did not examine the serious concerns posed by using professional discipline to punish constitutionally-protected speech or of the need to accommodate petitioner's ethical obligation to represent his clients zealously. Since petitioner did not make the argument or admission attributed to him, it is respectfully submitted the New York court erred in avoiding the constitutional issues he raised.

This is particularly true in light of the unusual circumstances of this case. To wit, petitioner submits it is doubtful he would have been subjected to any professional inquiry at all, but for the fact that he

made a motion for recusal asserting judicial impropriety and bias of a trial court judge who reacted by filing a disciplinary complaint.

Indeed, the record demonstrates that the professional inquiry arose out of a complaint to the Committee on Professional Standards by the trial court judge *at the same time he granted the recusal motion.* In this light, the issue of constitutional protection affects not only the content of the particular arguments and averments censured in this case, but the First Amendment right of both the attorney and client to petition for redress of legitimate grievances without fear of reprisal in the form of disciplinary proceedings. None of these issues were addressed by the New York courts.

Petitioner submits that construing the rules of conduct to define as deceptive an attorney's legal arguments, even if specious and inaccurate, without any proof of intentional misrepresentation of any material fact or law, and based on conclusory and paraphrased findings not supported by the record clearly constitutes the use of state regulatory authority based on vague and arbitrary standards ripe for erroneous and selective enforcement.

Finally, this Court has repeatedly held that the disciplining of First Amendment expression, should be reviewed for constitutional infirmities if properly raised below, as occurred in the instant case. Petitioner submits he will be denied the opportunity to challenge professional discipline of his speech in the course of representing clients on the grounds of unconstitutional violation of First Amendment rights unless a writ is issued by this Court.

REASONS FOR GRANTING THE WRIT

I.

Since the disciplinary action of the state court was taken against the petitioner attorney based solely on expression in proper legal arguments and assertions he made in pending cases, this Court should grant the writ first to determine if the discipline was warranted, and, if warranted, then to determine if the disciplinary action is, nevertheless, viola-

tive of petitioner's constitutionally-protected exercise of First Amendment rights on behalf of himself and his client.

Petitioner submits the instant case raises issues of paramount public importance in view of the public interest in allowing the vigorous advocacy necessary under our adversarial system without regard to whether or not an attorney, in the course of propounding proper advocacy, criticizes or questions the partiality of the presiding judge. The instant case represents nothing more than the efforts of counsel, in good faith, to make arguments which, only after making a motion to recuse a sitting judge, resulted in being the factual predicate for public censure despite the attorney's efforts to demonstrate both the utmost respect to the judiciary and propound arguments which had a proper factual basis as well as a basis in existing law.

From the outset, petitioner has expressly and repeatedly challenged his public censure on constitutional grounds based on the concerns that the retaliatory complaint and the charge that he engaged in fraud and deceit based on legal argumentation and opinions violated his First Amendment rights of speech and to petition the government for redress of grievances.

In seeking a writ in this Court, petitioner initially raises the issue of whether discipline of his expressive conduct was warranted, and expects this Court to address the constitutional infirmities only if necessary, in accordance with this Court's statement in *In Re Snyder*, 472 U.S. 634, 105 S.Ct. 2874 (1985), that:

> We avoid constitutional issues when resolution of such issues is not necessary for disposition of a case. Accordingly, we consider first whether petitioner's conduct and expressions warranted his suspension from practice; if they did not, there is no occasion to reach petitioner's constitutional claims.

Id., 472 U.S. at 642-643, 105 S.Ct. at 2880.

A. The State Court's Finding of Misconduct and Imposition of Discipline on Petitioner's Speech Were Unwarranted.

The Third Judicial Department imposed public censure on the grounds that a collateral estoppel argument petitioner made in a divorce matter was "specious" and that he allegedly "admitted" he "inaccurately assert[ed] in a sworn affidavit" the meaning to be inferred from informal discovery efforts he had undertaken with opposing counsel in a wrongful death case. 7a, *infra*.

Judge Robert E. Fischer initiated the disciplinary inquiry in a letter to the Professional Standards Committee of the Third Judicial Department. The judge's letter was mailed at the same time he granted petitioner's motion seeking his recusal on the basis of judicial impropriety and bias, or the appearance thereof. That recusal motion was initially made in the aforesaid wrongful death action in which petitioner represented the plaintiff, and alleged that Judge Fischer had granted summary judgment to the defendants while he was considering hiring as his law clerk one of the defense counsel, whom he did in fact hire within days of delivering the lengthy decision in the case. Since he learned of the hiring by chance within two weeks after the lengthy summary judgment decision had been issued, petitioner sought the judge's recusal and timely moved to have the decision reconsidered by a different judge. Thereafter, petitioner expanded the recusal motion to include *all* cases assigned to Judge Fischer in which petitioner was attorney-of-record after he learned of statements the judge made in private conversations that indicated he harbored an extreme personal bias against petitioner.

Approximately a month later, Judge Fischer both granted the recusal motion and initiated the disciplinary complaint, indicating that the latter explained why he granted recusal. Petitioner fully cooperated with the Committee's investigation. No misconduct was found with regard to a number of other allegations Judge Fischer purported were the justification for his personal and judicial bias against

petitioner that apparently pre-existed the recusal motion and existed during most of the events about which he was complaining.

After its investigation, the Committee advised petitioner Benjamin it had concluded he engaged in misconduct involving misrepresentations and other alleged deception in order to mislead Judge Fischer and opposing counsel in three unrelated cases, and sought petitioner's acceptance of a letter of admonishment, at which point petitioner invoked the disciplinary proceedings (6a-7a, *infra*) due to the very serious nature of the charge and the possibility of future consequences to his license to practice law if the admonishment was allowed to stand as an admission of fraudulent and deceptive misconduct.[1] The Committee then filed its Petition, citing various events that occurred one to three years previously in matters over which Judge Fischer had presided.

The Third Department ultimately found misconduct in two respects, namely:

> The evidence establishes that respondent attempted to mislead a trial court by asserting a specious *res judicata* or collateral estoppel defense on behalf of a client in the context of a divorce proceeding (specification one) and by inaccurately asserting in a sworn affidavit that he had failed to timely serve an amended complaint in a wrongful death action because the parties had agreed among themselves to continue discovery so that the amended complaint, when

---

[1]The Committee charged dishonesty and misrepresentation, rather than a different section of the code, such as that prohibiting engaging "in conduct that is prejudicial to the administration of justice." D.R. 1-102(a) (5) [22 NYCRR § 1200.3 (a) (5)]. The charge of misrepresentation appears to have been used because the judge who filed the letter of complaint indicated he felt respondent had engaged in misleading conduct.

> served, would not require additional amendments (specification 2). The affidavit was made in support of a motion to file a late amended complaint. Respondent later admitted that there was no express agreement among the parties to continue discovery.

Id. The Third Department imposed public censure, while acknowledging the Committee deemed private admonishment to be the appropriate level of discipline. *Id.* 7a.

In sustaining the charge, the Third Department appears to have relied on the referee's findings, and not on the documentary evidence that on its *face* demonstrates petitioner did not engage in misrepresentation.

(1) *Asserting a specious res judicata or collateral estoppel defense*

Petitioner did not make the argument attributed to him in the findings of the referee. If he had, the collateral estoppel defense he raised on behalf of a divorce client might have been specious. The referee's findings conflict with the actual content and context of petitioner's legal argument in all material respects.

In the first instance, contrary to the referee's finding, petitioner never contended there had been any conclusive determination in Family Court that resolved the ultimate issue of occupancy of the marital home. He argued only that certain allegations of spousal abuse had previously been litigated against the wife in Family Court, and those allegations should not be relitigated by her in Supreme Court on the issue of safety as a factor in awarding her exclusive *pendente lite* occupancy of the home.

The earlier proceeding occurred in Family Court, where the wife had filed a petition for a restraining order that would expel the husband from the marital home on the grounds of physical abuse. Her petition resulted in an *ex parte temporary* order dated November 7, 1988, that on its face ousted the husband from the marital home pending a hearing. A hearing occurred three days later on November

10, 1988, with the husband also present, and resulted in a second and final order by the same Family Court judge, but in this order the provisions ousting the husband had been deleted.

A couple of months later, the wife filed a show cause application in the divorce proceedings before Judge Fischer in Supreme Court, in which she sought exclusive occupancy of the marital home prior to the property division in the pending divorce, and cited the same allegations of abuse. The matter was adjourned to March 9, 1989 for an evidentiary hearing. In a letter to Judge Fischer dated February 23, petitioner limitedly addressed the estoppel argument as follows: "The issues concerning safety of the [wife] have already been adjudicated in Family Court." The letter goes on to argue that "ultimate resolution of the marital property should be determined in the divorce proceeding, rather than by way of a separate hearing." At a minimum, this letter makes crystal clear petitioner believed issues of exclusive occupancy pending the divorce as well as the ultimate resolution of the marital property had not been decided in Family Court.

Consistent with the letter, the transcript of the evidentiary hearing conclusively establishes petitioner properly appeared and participated in the hearing before Judge Fischer, and, only when the wife's attorney began to elicit testimony as to the alleged physical and verbal abuse by the husband, did he object on the following estoppel grounds:

> MR. BENJAMIN: Your Honor, I object. There was a hearing on precisely these issues in Family Court, and *findings made that there was no physical abuse by Mr. Hall.*

[Emphases added.} During the discussion of this objection, petitioner cleared up Judge Fischer's misconceptions about the narrow estoppel argument he was making in the following colloquy at that time:

> THE COURT: Counsel asserts, as I understand it, . . . that by reason of the application hearing and ultimate determination, as exhibited in Exhibit 5, that the matter of occupancy,

sole occupancy, of the premises at Frederick Street, is *res judicata* or collaterally estopped from raising it. That's his reason for offering it. Is that your position?

MR. BENJAMIN: *No. That is not our position, your Honor.* I misspoke. That's not what I meant to convey as our position.

Our position is that *the only effect of the Family Court Order is to prevent Mrs. Hall here from relitigating again the issue of physical abuse against Mr. Hall, because that was resolved against her by Judge Esworthy. He did not resolve in effect—he especially said in that proceeding that the title was not before him, and the only issue was that violence was—*

THE COURT: Originally you told me you were raising the issue of *res judicata* or collateral estoppel.

MR. BENJAMIN: I misspoke. I meant collateral estoppel, and on the question of occupancy, *but only as to the factual allegations they're trying to raise here that Mr. Hall physically assaulted or otherwise did something to Mrs. Hall. Because those allegations were adjudicated against her in Family Court. On no other basis.*

THE COURT: They were adjudicated against her in Family Court?

MR. BENJAMIN: That's correct.

[Emphases added.] Given the letter to Judge Fischer and the above verbatim transcript of the argument, it is difficult to understand how the referee concluded petitioner argued the issue of exclusive occupancy had been fully resolved or conclusively determined in Family Court, 11a, *infra*, particularly since those words were not even used by petitioner. At a minimum, petitioner's full participation in the hearing and the above excerpt of the transcript evidence he did not suggest to Judge Fischer by words or action that there had been a conclusive determination of any kind in the earlier Family Court

proceeding. To the contrary, he argued an issue-preclusive determination had been made only on whether physical abuse against the wife had occurred as she alleged.

The impossible burden imposed on petitioner in the disciplinary hearing is illustrated by the fact that, despite finding the husband had "re-occupied the marital home" as a result of the second Family Court order, the referee went on erroneously to conclude:

> From the credible evidence before me, the assertion ["that the prior proceedings in Family Court had *res judicata* effect on the instant motion"] can only be described as specious. The evidence fails to show any conclusive determination in Family Court of the ultimate issues. Judge Esworthy's order of November 10, 1988, shows on its face that it was a limited order. ...

12a, *infra*. Contrary to the above rulings, the transcript establishes petitioner represented the Family Court judge "said in that proceeding that the title was not before him."

The referee's further conclusion that the argument was specious because petitioner failed to produce "any" documentation (11a, *infra*) to that effect is clearly incorrect. Petitioner did in fact produce documentary proof, the proffer of which engendered the following colloquy with Judge Fischer:

> THE COURT: I have read these. You are offering them for what purpose?
>
> MR. BENJAMIN: For the purpose of demonstrating that *the allegations of physical abuse were tried and were adjudicated* not to have occurred in Family Court before Judge Esworthy.
>
> THE COURT: You are asserting that these papers display that?
>
> MR. BENJAMIN: Yes. Well, these papers, without a transcript, obviously, the full factual adjudication can't be determined here. However in the affidavit, and I think,

absent a transcript, there is no other way to demonstrate that the *question of physical abuse was tried, adjudicated*, and is *res judicata*—or rather collateral estoppel.

[Emphasis added.] In further discussion on the issue of this documentary proof the following exchange occurred:

THE COURT: You have something to indicate that? Because I have before me what you have offered, that states that she's granted an Order of Protection providing that the respondent Mr. Hall will not molest or harass her in any way, physically or verbally.

MR. BENJAMIN: That's correct, Your Honor. That November 23rd order modifies a November 7th order which is Exhibit 4.

THE COURT: Temporary order. Initial temporary order before hearing.

MR. BENJAMIN: That's correct.

THE COURT: And after the hearing Exhibit 5 was issued.

MR. BENJAMIN: That's correct.

THE COURT: And you are suggesting that because he precluded the defendant James Hall from molesting or harassing her physically or verbally, or threatening her by telephone, that the Court reached some other conclusion than that?

MR. BENJAMIN: The difference between the November 7th temporary order and the November 23rd order issued after a hearing is that pursuant to the November 7th order Mr. Hall was directed to remove himself from the marital home.

THE COURT: I observed that.

MR. BENJAMIN: After the hearing, that was deleted because there was a failure on the part of Mrs. Hall—

THE COURT: Where is that?

...

> MR. BENJAMIN: It's in the affidavit Mr. Hall submitted in opposition to this motion on Order to Show Cause. There is no way that a party is going to have a transcript before the Court. The affidavit flatly asserts that the allegations of physical violence were [decided] against the defendant [wife].
>
> THE COURT: I can't accept that assertion on the basis of the documents entered and received here.
>
> Is there anything else you want to offer at this time?
>
> MR. BENJAMIN: Not at this time.

Apparently Judge Fischer rejected the estoppel defense because, in his opinion, petitioner did not present *enough* documentary evidence.

It is significant the committee presented no evidence that any of the Family Court documents petitioner produced were false; or that the wife or her attorney ever denied what petitioner claimed had occurred in Family Court; or that Judge Fischer was unable to apply or reject the doctrines of *res judicata* and collateral estoppel on the basis of the Family Court documents petitioner did present in conjunction with the parties' opposing affidavits; or that petitioner should not have made the argument at all without first producing a transcript of the Family Court.

Viewing the statements qualitatively, it is clear petitioner actually argued only that the wife should be estopped from relitigating the same abuse allegations she raised in Family Court to prove her safety was in jeopardy as a factor for awarding her exclusive *pendente lite* occupancy of the marital home in Supreme Court. *This argument was warranted by the facts:* the judge in collateral proceedings in Family Court on the exact same allegations of abuse had found insufficient evidence of physical abuse to issue an order of protection removing the husband from the marital home. *This argument was also warranted by existing law: see,* for example, *Casson v. Casson,* 107 A.D.2d 342, 486 N.Y.S.2d 191 (1st Dept. 1985). *See* also *Brown v. Keating,* 166 N.Y.A.D.2d 220, _ N.Y.S.2d _ (1st Dept. 1990), where

the attorney made a similar estoppel argument on weaker facts.[2] Thus, petitioner's argument in the divorce case clearly was not specious at all.

The referee opined that the estoppel argument was specious because in the Family Court order,

> ...the wording referring to Mrs. Hall uses the ambiguous words "at home". Which home, the marital residence owned by her, or wherever she might be residing?

12a, *Infra*. This query makes no sense. It was, quite simply, incongrous for the referee to interpret the term "at home" in a marital dispute as ambiguous in order to conclude the argument was specious. There was no evidence the Family Court order somehow *excluded* the marital home. Clearly, since the term "at home" could have been inclusive of the marital home, petitioner's argument was not specious on that ground.

The record herein demonstrates petitioner did not knowingly or intentionally misrepresent any fact or law; rather, he was censured because he made losing legal argument. The evidence on this point was ignored: the transcripts clearly and convincingly demonstrated that petitioner went to great lengths to articulate his arguments

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[2]Petitioner cited these cases in his argument to the Third Department opposing confirmation of the referee's report. *Brown v. Keating* appears to be directly on point. In *Brown* the Appellate Division affirmed the trial court's order granting a wife exclusive possession of the marital home to protect her safety, and rejected the husband's argument in Supreme Court that collateral estoppel or *res judicata* effect should be given an order of the Family Court that had granted "mutual orders of protection to the parties." 166 A.D.2d at 220. The First Department stated the reason to be that "the Family Court matter was settled by stipulation, without prejudice." *Id.* There was no intimation by the appellate court that the attorney in the case had made a specious argument.

carefully and at the same time clear up any misconceptions the judge or opposing counsel might have had.

(2) *Inaccurate assertion in a sworn affidavit.*

This finding of misconduct derives from events surrounding statements petitioner made in an affidavit that later became the subject of an oral argument before Judge Fischer on June 7, 1991. The sworn statement, which supported a motion for leave to serve an amended complaint out of time, was that:

> 29. Your deponent respectfully submits that the reason the Amended Complaint was not timely filed was that the parties had agreed among themselves to continue with discovery to develop additional facts so that when the Amended Complaint was served it would not need future amendments.

At oral argument he made the following specific statements in a colloquy with Judge Fischer:

> THE COURT: One of the problems of concern to me, apparently there is some conflict between counsel as to why discovery did not go forward, and apparently there are differences between you and counsel as to why it did not go forward.
>
> MR. BENJAMIN: Why it did not go forward. In other words, they are saying there is no agreement that I could go beyond this Court's December order before providing an amended complaint. And I had indicated that we were *informally* proceeding with discovery so that I would not have to amend this complaint again to try to put this in a more cohesive posture. *I agree there was no formal agreement with anyone [but] that is what we were doing.* And I was attempting to get more information. Discovery came to an end.
>
> THE COURT: That is not an agreeement with counsel. That is your state of mind.

> MR. BENJAMIN: *Based on what we were doing, conducting depositions and exchanging other material.*
>
> THE COURT: That was your state of mind derived from that.
>
> MR. BENJAMIN: Yes, your Honor. And with respect to the way discovery ended, Mr. Yaus, Mr. Brown advised me they were not going to do any further discovery until I served an amended complaint, and that precipitated the motion.

[Emphases added.]

While the transcript shows petitioner conceded no "formal" agreement existed, the Third Department found misconduct on the basis that petitioner's assertion was inaccurate because there was no "express" agreement. 7a, *infra.* Petitioner submits the documentary evidence demonstrates that, he reasonably believed there was an understanding with opposing counsel — albeit tacit if not express, and informal if not formal — to complete additional discovery before he filed an amended complaint. Moreover, petitioner submitted uncontroverted testimony by an expert, who is both an attorney and a retired Supreme Court judge, who opined in no uncertain terms, and based on more than 30 years local practice, that the type of informal discovery petitioner contended was ongoing was common practice in Broome County.

Petitioner did not "admit" there was no agreement; rather, he agreed it was his "state of mind" that there was an agreement based on the cooperation of opposing counsel in his discovery plan. There was ample proof the parties did conduct discovery informally by mutual consent based on an understanding petitioner would be utilizing the informal discovery efforts to amend the complaint, which all opposing counsel knew had not yet been filed at the time they participated in the discovery. Correspondence in the record supports petitioner's contention he was correct in stating there was an agreement with opposing counsel; not only had petitioner written lengthy letters outlining a discovery plan he asked them to agree to, it was undis-

puted opposing counsel participated in the informal discovery plan by consent. For example, the record included a letter of Craig Brown, Esq., mentioning he was withdrawing his "consent" to any *more* informal discovery.[3] Given this documentary evidence of the circumstances surrounding this dispute, petitioner's assertion on this point was not inaccurate, nor was it a falsehood.

While there may have been better ways to handle the situation, petitioner did not **misrepresent** what he reasonably believed had occurred.[4]

Even if petitioner was wrong to have inferred their consent, his state of mind was objectively reasonable since it was based on actual conduct of counsel about which the record amply showed there was no misrepresentation.

Indeed, the referee apparently credited petitioner's proof that the parties in fact engaged in the informal discovery referred to in the affidavit, and found as fact "that it was common practice in Broome County, and elsewhere, for attorneys to conduct informal discovery ... is undoubtedly true." 13a, *infra.* Nevertheless, the referee went on to

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[3]Ironically, Mr. Brown is the attorney Judge Fischer hired as his law clerk some months later around the same time he granted summary judgment in favor of Mr. Brown's clients in this case, based in part on the conclusion that the dispute surrounding the motion to amend the complaint out of time should be resolved in favor of the defense.

[4]It is black letter New York law that an agreement can be inferred from the conduct of the parties. *Miller v. Schloss,* 218 N.Y. 400, 113 N.E. 337; *Grombach Productions, Inc. v. Waring,* 239 N.Y. 609, 59 N.E. 2d 425. *See* also *Kornblum Metals Co. v. Intsel Corp.,* 38 NY2d 376, 379 NYS2d 826, 342 N.E.2d 591.

conclude, erroneously, that misconduct had occurred on the ground this practice "is deemed inappropriate under circumstances that existed in the subject action." *Id.* It is respectfully submitted that, while it may be "inappropriate," such a practice is not *per se* deceptive.

The referee's conclusory finding that respondent's statement in an affidavit was "not true" (*id.*) cited none of evidence adduced at the hearing or any specific facts. The judge's subjective characterization of this conduct as a "state of mind" rather than an "agreement" constitutes a vague standard for imposing discipline on speech. Moreover, it ignores the uncontradicted opinion of Benjamin's expert witness to the effect that it was reasonable to believe opposing counsel's conduct occurred pursuant to an "agreement" in the wrongful death case. To the extent Benjamin's belief was objectively reasonable, imposition of discipline was not proper. *Matter of Holtzman*, 78 N.Y.2d 184 (1991).

* * *

The propriety of charging him under DR 1-102(a)(4), which is reserved for conduct warranting disbarment, *Matter of Altomerianos, supra*, was not addressed below. It is respectfully submitted New York's disciplinary rule against deceit is simply inapplicable to inaccuracies without proof there was an intent or motive to deceive beyond winning a legal argument. *In the Matter of Snow*, 160 A.D.2d 1173, 1174 (3d Dept. 1990). There was no indication Benjamin misrepresented any facts in either situation, although the Committee accused him of misrepresenting the *effect* of various events. While misrepresentation of facts could mislead a judge or opposing counsel, it is doubtful judges and opposing counsel can be "deceived" by inaccurate arguments or interpretations of the legal effects of truthful facts.

It is respectfully submitted an attorney's advocacy on behalf of clients should not be punished based on subjective views of third persons who believe the attorney attempted to mislead them where the

attorney's statements do not rise to the level of deceit or misrepresentation. *See*, for example, *Application of Mosher*, 25 F.3d 397, 401 (6th Cir. 1994). Given the absence of proof that petitioner actually misrepresented any facts or law, material or otherwise, it is most likely petitioner was disciplined because the original complaint was initiated by a trial court judge who indicated he felt petitioner attempted to mislead him.

Probative on this contention is the level of discipline ultimately imposed. The Third Department apparently *agrees* with petitioner that his conduct did not rise to the level of misrepresentation prohibited by the code, because, not only did the Committee on Professional Standards originally ask petitioner to accept a *private admonishment*, the Third Department ultimately imposed *public censure* because it determined that his conduct, "when placed in context," was not "so egregious as to warrant suspension or disbarment." 7a, *infra*.

The record of the New York factfinding hearing demonstrates petitioner is being disciplined based, in large part, on the referee's acceptance of the subjective beliefs of the trial court judge who initiated the disciplinary complaint concerning whether or not the argument and averment could be viewed as misleading. Since an objective test should have been applied under New York law, *see Matter of Holtzman, supra*, 78 N.Y. 2d at 191, the judge's testimony shed no light on the issue of misconduct or on the *verbatim* transcripts and documents that completely obviated the need to paraphrase or rely on the recollection of witnesses.

Significantly, petitioner lost the arguments before a judge who later conceded, by granting the recusal motion, that he was personally biased against petitioner at the time these events transpired. Under the circumstances, it is respectfully submitted that:

> Simply because the ... court does not credit the authority and disagrees with the statement it supports does not mean that [the attorney] was lying to the court.

Application of Mosher, supra, 25 F.3d at 401 [district court denial of application for admission reversed and remanded because, *inter alia*, evidence of "mistaken misuse of legalese" and other incorrect statements do not support a finding of deliberate attempt to mislead the court]. The danger is great that the trial court judge's subjective testimony was credited and given more weight than the *verbatim* transcripts on the issue of whether petitioner had tried to mislead him, despite the fact that the trial court judge granted recusal in a manner indicating his personal bias against petitioner apparently existed throughout the events for which the latter was disciplined. Highly probative on this issue, is the fact that his arguments were deemed *per se* misleading to the judge and opposing counsel, despite the fact that it is doubtful legal arguments and inferences derived from truthful facts and law could "deceive" a judge or opposing counsel whose business it is to know the law.

B. The State Court's Imposition of Discipline Violated the Petitioner Attorney's First Amendment Rights of Free Expression and to Petition for Redress of Grievances.

There were no alternative non-speech grounds for imposing censure on petitioner, in that the only factual basis in the record consists of the words spoken by counsel in the course of oral and written legal argument, and those words go to the core issue of whether or not an attorney propounding a particular argument or issue before a court may articulate reasonable, if not perfect, inferences based on the factual circumstances of the case. The courts below relied on no other facts or conduct in censuring counsel for the ultimate conclusions that an alleged specious argument and alleged inaccurate assertion fall outside the limited constitutional protection afforded attorneys acting in their capacities as officers of the court.

Petitioner unhesitatingly acknowledges that: "In the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 2743 (1991). Petitioner

respectfully submits, however, that where no non-speech conduct is identified as the basis of disciplinary action taken against an attorney, this Court will conduct a *de novo* review to determine whether or not the facts support a finding that the speech was not constitutionally protected. *See* opinion of Justice Kennedy, joined by Justices Marshall, Blackmun and Stevens, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 2726 (1991), stating:

> We have held that "in cases raising First Amendment issues ... an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286, 84 S.Ct. 710, 728-729, 11 L.Ed.2d 686 [1964]).

Gentile, 501 U.S. at _____, 111 S.Ct. at 2726. *See* also *Greenbelt Cooperative Publ. Ass'n v. Bresler*, 398 U.S. 6, 11, 90 S.Ct. 1537, 1540 (1970).

Petitioner submits that in the instant case, the importance of a writ to ensure this Court's *de novo* review is underscored by the fact that the Third Department's decision does not mention or address his constitutional claims and his appeal as of right and motion for discretionary review were rejected by the New York Court of Appeals. Thus, while attorney discipline proceedings should afford the attorney "an adequate opportunity to present the federal challenge" where he has raised constitutional claims, *see*, for example, *Middlesex County Ethics Committee v. Garden, Etc.*, 457 U.S. 423,434, 102 S.Ct. 2515, 2522 (1982), the New York courts have summarily rejected Benjamin's constitutional claims without discussion of any kind.

The New York Court of Appeals has indicated that the safeguarding of the public interest should be the result of objective regulation of attorneys, as reflected in the following ruling:

> In order to adequately protect the public interest and maintain the integrity of the judicial system, there must be an objective standard of what a reasonable attorney would do in similar circumstances [citation omitted]. It is the reasonableness of the belief, not the state of mind of the attorney, that is determinative.

Matter of Holtzman, supra, 78 N.Y.2d at 192-193. Assuming *arguendo*, that his speech was specious and inaccurate, petitioner submits that a charge of misconduct based on the quality of a legal argument or inference nevertheless constitutes a vague, overbroad and standardless regulation of attorney speech in advocating for clients.

On the issue of a standardless regulation, petitioner points out that in *Holtzman*, a well-known attorney was charged with making a false accusation of misconduct against a judge, and was *not* charged, let alone found to have committed, misconduct involving misrepresentation under DR 1-102(a)(4), despite the court of Appeals ruling that:

> The factual basis of Charge 1 is that petitioner made false accusations against the Judge. This charge was sustained by the Committee and upheld by the Appellate Division, and the factual finding of *falsity (which is supported by the record)* is therefore binding on us.

Id., 78 N.Y.2d at 190 [emphasis added]. While falsehood was charged and found, the Court of Appeals ultimately affirmed the Appellate Division's conclusion that Holtzman's conduct violated only the general prohibition against "conduct that adversely reflects on the lawyer's fitness to practice law." DR 1-102(A)(6) [now DR 1-102(a)(8)]. While petitioner was publicly censured, Ms. Holtzman received a Letter of Reprimand. It is unclear how the instant petitioner's expressive conduct was deemed more egregious and sufficient

to warrant discipline as misrepresentation, when the falsehood in *Holtzman* was not treated as misrepresentation at all.[5]

The fact that a legal argument may be specious does not render it *per se* deceptive. *Application of Mosher, supra.* The question is whether a state court may proceed to discipline an attorney without any further showing than that the legal argumentation and inferences are deemed specious and inaccurate. The attorney's specific words and their context should be directly at issue. Petitioner submits his words were made in the course of litigation and that:

> These specific statements are hardly damning by themselves, and clearly call for the light examination in context may give them; so examined, they do not furnish any basis for a finding of professional misconduct.

In Re Sawyer, 360 U.S. 622, 633 (1959).

Since the alleged misconduct in the instant case clearly occurred in the context of representing clients in a respectful manner, petitioner submits the Third Department erred in failing to construe the allegations in light of the proper context of New York's Code of Professional Responsibility, including D.R. 7-102, which states:

> (a) In the representation of a client, a lawyer shall not: ...
>
> (5) **Knowingly** make a false statement of law or fact.

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[5]Although petitioner is hardly as prominent as Ms. Holtzman, it is respectfully submitted that to charge him with deceptive conduct while Holtzman's clearly false accusations were not deemed to rise to that level would possibly permit the public to conclude that status rather than language is the measure of First Amendment rights. It also raises the question of whether the rules are equally applied to comparable conduct and whether attorneys are protected by equal access to the Court of Appeals to appeal discipline of expressive conduct.

22 NYCRR §1200.33(a)(5) [emphasis added]. There was no evidence that petitioner knowingly misstated any fact or law. The evidence showed he drew reasonable inferences based on truthful fact and legal precedent and practice. He went to great lengths not to mislead. The heightened standard requiring a knowing and intentional misstatement to be proven with respect to attorney speech in the course of representing clients is clearly necessary to accommodate both the attorney's obligation zealously to represent clients and his First Amendment right to do his job as an advocate.

To impose discipline on the basis of characterizing an argument as specious or inaccurate fails to provide any objective guidance to attorneys who must advocate for their clients without fear that a losing argument may result in disciplinary proceedings. The Third Department made no attempt to analyze the interests of petitioner and his clients in making the recusal motion and in asserting the legal argument and sworn statement disciplined in this case, despite the fact that this Court has held in the attorney discipline context that:

> When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 2745, 115 L.Ed.2d 888 (1991).

With respect to instances where speech is concerned, the court in *N.Y. State Ass'n of Career Schools v. Educ. Dept.*, 823 F.Supp. 1096 (S.D.N.Y. 1993), stated:

> In *United States v. O'Brien*, 391 U.S. 367, 376-77, 88 S.Ct. 1673, 1678-79, 10 L.Ed.2d 672 (1968), the Supreme Court set forth the test to be employed by courts to analyze the government regulation of conduct that may have an expressive content.

Id., 823 F.Supp. at 1100. Indeed, "a court must balance the competing interests of the parties and assess the scope of the restrictions imposed by the state." *Id.* Petitioner's divorce client clearly had an interest in

making a defense based on facts and inferences stemming from events in Family Court that had previously failed to accomplish his removal from the marital home. Likewise, in the wrongful death case, all the attorneys participated in a known common practice, which indicates there was no evidence adduced to show that the state has an interest in using professional discipline to discourage such a practice.[6]

Even if it is concluded the same facts that support a charge of making an "inaccurate" legal argument would support a charge of making a "specious" argument, petitioner asserted below that the Third Department's interpretation of DR 1-102(A)(4) defining inaccurate legal arguments as specious and, therefore, deceptive, constitutes the use of state regulatory authority based on vague and arbitrary standards. Such interpretation is "subject to selective enforcement because of vagueness." *Person v. Assoc. of Bar of City of N.Y.*, 554 F.2d 534, 538 (2d Cir. 1977), citing *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). If an argument is deemed *per se* deceptive conduct because it is inaccurate or even specious, it would appear that no attorney on the losing side of an argument could escape the possibility of professional discipline if a judge initiates a disciplinary complaint alleging deceptive conduct based on the merits of the position asserted by the attorney.

While the state might have an interest in disciplining misrepresentations of fact and miscitation of law, it has no interest in ensuring attorneys make only ironclad arguments. The use of Disciplinary Rule 1-102(A)(4) to regulate attorney advocacy is particularly inconsistent

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[6]To the contrary, as reflected in its notes in Article 31 of the New York rules of practice regarding disclosure, the Advisory Committee has found:

> The provisions are designed to encourage attorneys to settle their procedural disputes informally without the aid of the court...

Comments to NY CPLR §3101, CLS, Vol. 4G, p. 436.

with the First Amendment or the state interests sought to be safeguarded where the argument and sworn statements are based on facts and events which may be viewed in more than one way, as in the instant case. It is respectfully submitted the state has little or no interest in resorting to the disciplinary process to ensure litigators do not inaccurately assert legal arguments the appeal process already adequately regulates, including the prospect of sanctions if an argument is baseless or frivolous. *See,* for example, *Hastings v. Maine-Endwell Cent. Sch. Dist., 676* F.2d 893, 897-98 (2d Cir. 1982), where petitioner was on the other side of this coin.

It is further submitted the state has little if any interest in punishing advocacy in order to protect judges and opposing counsel from inaccurate or specious legal *arguments* in the adversarial process, particularly when the same is based on mere inaccuracies and subjective interpretations or differences of opinions as to the meaning of words and actions. This is particularly true with respect to the selective use of DR 1-102(A)(4) to punish such arguments when the Committee makes no showing of any motive or intent. If motive and intent can be inferred from the mere making of a specious argument or inaccurate averment, there are most likely few cases in which an attorney loses a legal argument that motive and intent cannot be inferred without any additional showing. That is overbroad and vague regulation in a profession where there is usually one losing argument in every dispute.

Even if the state has an interest in ensuring that litigators are unfailingly precise and accurate in their legal arguments and inferences, in the instant case, there was no balancing of that interest against the interest of petitioner and his client to raise defenses he has reason to believe may be supported by the facts and law even if his legal argument is rejected. *See,* for example, *Application of Mosher, supra,* where the Sixth Circuit balanced "the interests of the applicant attorney in being able to practice his profession and the interests of

clients in being represented by counsel of their choosing" against the court's interest in admitting appropriate attorneys. *Id.*, 25 F.3d at 400.

Such balancing appears to be required by the express restriction in the New York disciplinary rules to "knowing" and material misrepresentations in the course of representing clients. The disciplinary rules should not be read to place vague and ambiguous burdens on an attorney's representation of clients. While misrepresentation of facts or miscitation of law could be a deliberate attempt to mislead a judge, it is doubtful judges and opposing counsel can claim to be"deceived" by inaccurate legal arguments or inferences.

II.

The disciplinary proceedings impermissibly impinged on and chill petitioner's exercise of the first amendment freedoms of speech and to petition government for redress of grievances; the proceedings ratified the retaliatory actions of a trial judge who had filed the disciplinary complaint as his rationale for granting his own recusal based on petitioner's motions asserting judicial impropriety and personal bias on the judge's part.

It cannot be doubted that "the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights." *Johnson v. Avery*, 393 U.S. 483, 490 n.11, 89 S.Ct. 747, 751, 21 L.Ed.2d 718 (1969).

The disciplinary proceeding was initiated because petitioner questioned a trial judge's impartiality in a recusal motion. The recusal motion petitioner submitted to Judge Fischer was clearly done in a lawful manner. The fact that the recusal motion was granted compels the conclusion there was a legitimate basis for questioning the judge's impartiality. It is respectfully submitted the imposition of discipline under the circumstances in the instant case permits the trial judge to avoid scrutinizing his own conduct and to retaliate by the use of stale and largely subjective charges to accuse the attorney of his conduct that discredits his recusal motion.

In this regard, petitioner submits this Court should find it is doubtful petitioner's conduct would have been disciplined at all, but for the fact that he had made the motion for recusal of the same trial court judge who filed the disciplinary complaint. Indeed, it was not until July of 1992, *after* petitioner filed the motion asking Judge Fischer to recuse himself from all cases in which petitioner was counsel-of-record, that the judge responded by filing the disciplinary complaint setting forth a number of earlier incidents from 1989 through 1991 in a manner directed at petitioner's credibility, thus shifting the focus away from the judge's own conduct.

It is further respectfully submitted the Appellate Division, itself and through its Committee on Professional Standards, ratified the retaliation by one of its trial court judge's by bringing and sustaining a petition charging appellant with dishonesty that in fact and effect sought to punish appellant for advocating legally permissible arguments on behalf of clients in two unrelated cases and for other conduct not violative of the professional rule prohibiting dishonesty and misrepresentation. The evidence was clear that Judge Fischer summarily granted recusal, and made no findings or conclusions on the merits of the recusal motions with respect to his own conduct involving impropriety or bias, and instead referred a complaint against respondent to the Committee based on various past events, some having occurred as much as three years prior. Under these circumstances, there were strong inferences supporting respondent's claim that the complaint was impermissible retaliation for petitioning the judge for recusal.

Petitioner was disciplined for misrepresentations he did not make and for the content of his speech—*i.e.*, the merits of his legal arguments and inferences—and in direct response to the motion for recusal. While this may sound as if petitioner is overstating the situation, since he was only publicly censured and not suspended or disbarred, there can be no doubt that a charge of misrepresentation has serious professional implications. *See*, for example, *Erdmann v.*

Stevens, 458 F.2d 1205 (2d Cir. 1972), where the Second Circuit observed that:

> [D]isciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment—loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions, particularly if his branch of law is trial practice.

458 F.2d at 1210. As the Third Department has noted, this instance will be viewed in the light of past and future disciplinary action, and will stand as prior discipline for falsehoods. 7a, *infra*.

It is clear respondent may be subjected to selective enforcement and harsher discipline if he is in the future accused of making another inaccurate or specious legal argument or statement that in the subjective view of a judge or opposing counsel is misleading. Public censure has already occurred in this matter. The effect on the attorney cannot be doubted.

Conclusion

For the reasons set forth above, the Petition should be granted.

Respectfully submitted

RONALD R. BENJAMIN, *Pro se*
126 Riverside Drive
P.O. Box 607
Binghamton, New York 13902
(607) 772-1442

APPENDIX I.

Order of the New York Court of Appeals, dated December 22, 1994

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of December 1994

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 1359

In the Matter of Ronald R. Benjamin, an Attorney and Counselor-at-Law. Committee on Professional Standards, Third Judicial Department,

Respondent,

Ronald R. Benjamin,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

DONALD M. SHERAW
Clerk of the Court

* * *

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Board

Clerk's Office
Albany, New York 12207

DECISION December 22, 1994

Mo. No. 1359 Motion for leave to appeal denied.

In the Matter of Ronald R. Benjamin, an Attorney and Counselor-at-Law.
Committee on Professional Standards, Third Judicial Department,
Respondent,
Ronald R. Benjamin,
Appellant.

APPENDIX II.

Order of the New York Court of Appeals dated September 22, 1994

STATE OF NEW YORK

Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of September 1994

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 1155 SSD 75
In the Matter of Ronald R. Benjamin, an Attorney and Counselor-at-Law.
Committee on Professional Standards, Third Judicial Department,
Respondent,
Ronald R. Benjamin,
Appellant.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial consitutional question is directly involved.

DONALD M. SHERAW
Clerk of the Court

* * *

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION September 22, 1994

Mo. No. 1155 SSD 75
In the Matter of Ronald R. Benjamin, an Attorney and Counselor-at-Law.
Committee on Professional Standards, Third Judicial Department,
Respondent,
Ronald R. Benjamin,
Appellant.

Appeal dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

APPENDIX III.

Memorandum and Order of the State of New York Supreme Court, Appellate Division, Third Judicial Department

SUPREME COURT — APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

Decided and Entered: June 24, 1994

In the Matter of RONALD R. BENJAMIN, an Attorney and Counselor-at-Law.

Memorandum and Order

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Petitioner;

RONALD R. BENJAMIN,

Respondent.

Calendar Date: June 9, 1994

Before: Mikoll, J.P., Mercure, Crew III, Yesawich Jr., and Peters, JJ.

Mark S. Ochs (Kenneth H. P. Bryk of counsel), Albany, for petitioner.

W. Haywood Burns, New York City, for respondent.

Per Curiam.

Respondent was admitted to practice by the Fourth Department in 1978. He maintains an office for the practice of law in Binghamton.

Petitioner, the Committee on Professional Standards, moves to confirm the report of a referee, issued after a hearing, which sustained a charge of professional misconduct against respondent, who opposes the motion and cross-moves to disaffirm the report.

By petition dated July 6, 1993, petitioner charged respondent with having attempted to mislead and deceive a trial court and opposing counsel in various matters, in violation of the Code of Professional Responsibility, DR 1-102 (A)(4) ("A lawyer shall not: . . . Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"). The petition was filed upon respondent's decision to challenge a private admonition petitioner had intended to issue and upon his demand that petitioner institute

a disciplinary proceeding (*see,* 22 NYCRR §806.4 [c][2]). Three specifications were set forth under the single charge.

We confirm the referee's report insofar as it sustained the first two specifications and disaffirm the report insofar as it sustained the third specification.

The evidence establishes that respondent attempted to mislead a trial court by asserting a specious *res judicata* or collateral estoppel defense on behalf of a client in the context of a divorce proceeding (specification one) and by inaccurately asserting in a sworn affidavit that he had failed to timely serve an amended complaint in a wrongful death action because the parties had agreed among themselves to continue discovery so that the amended complaint, when served, would not require additional amendments (specification 2). The affidavit was made in support of a motion to file a late amended complaint. Respondent later admitted that there was no express agreement among the parties to continue discovery.

According to the third specification, respondent attempted to mislead opposing counsel in a letter replying to a demand for a bill of particulars by requesting an extension of time to respond to the demand "until after the State has made their motions and a decision has been rendered on same." This letter could be read as implying that respondent had knowledge that motions would be made by the State in the action when, in fact, he had no such knowledge. However, because the letter could also be read as indicating respondent's reasonable expectation, based on his experience, that such motions would be made, we reject the specification's allegation that respondent was attempting to mislead opposing counsel.

While we condemn any effort to mislead a court, we do not find respondent's misconduct, when placed in context, so egregious as to warrant suspension or disbarment, even noting the aggravating circumstance of his prior disciplinary record

which includes letters of caution from petitioner (*see,* 22 NYCRR § 806.4 [c] [1] [iii]) and a six-month suspension by this court in 1987 (*Matter of Benjamin,* 129 AD2d 886). The trial court was not misled by either the *res judicata* defense or the assertion of an agreement to continue discovery and both arguments were rejected by the trial court after short colloquies with respondent.

We conclude that to preserve the reputation of the bar and to deter similar misconduct, respondent should be and hereby is censured.

Mikoll, J.P., Mercure, Crew III, Yesawich Jr., and Peters, JJ. concur.

ORDERED that respondent is censured.

ENTER:

MICHAEL J. NOVACK
Clerk

APPELLATE DIVISION SUPREME COURT
THIRD DEPARTMENT
STATE OF NEW YORK

I, MICHAEL J. NOVACK, Clerk of the Appellate Division of the Supreme Court Third Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on JUN 24, 1994 and that the same is a correct transcript thereof and of the whole said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court on JUN 24 1994

MICHAEL J. NOVACK

APPENDIX IV

Report of Referee, dated April 6, 1994

SUPREME COURT

STATE OF NEW YORK

Appellate Division — Third Judicial Department

In the Matter of RONALD R. BENJAMIN, an attorney and Counselor at Law.

COMMITTEE ON PROFESSIONAL STANDARDS,

Petitioner,

RONALD J. BENJAMIN,

Respondent.

REPORT OF REFEREE

KENNETH H. P. BRYK, Staff Attorney
Appearing on Behalf of
Committee on Professional Standards
Third Judicial Department, Petitioner

KEVIN F. MC DONOUGH, ESQ.
Attorney for Respondent

REPORT OF REFEREE

LISTON F. COON, Referee

Respondent, who was admitted to practice in New York State in 1978, has been charged with professional misconduct in violation of Disciplinary Rule 1-102 (A)(4).

The Notice of petition alleges one charge, composed of three specifications. In sum, the petition alleges acts attempting to mislead and deceive the Supreme Court and opposing counsel in various matters.

The acts complained of extend to matters in legal actions pending before the Honorable Robert E. Fischer, Justice of the Supreme Court.

Hearings in the matter were held before the undersigned on October 19, 1993, November 16, 1993, and December 2, 1993. Respondent was represented by counsel throughout the hearings.

FINDINGS

SPECIFICATION 1.

This specification involves events arising out of the marital strife of James Lewis Hall and Linda Evelyn Hall, who were married on July 5, 1988. Prior to the separation of the parties around October 1, 1988, they resided together at 47 Frederick Street, Johnson City, New York. Title to the marital home was in the name of Mrs. Hall.

Following an altercation between the two on November 5, 1988, Mrs. Hall initiated a family offense proceeding in the Family Court of Broome County in which she sought an order of protection. On November 7, 1988, Broome Family Court Judge Joseph W. Esworthy issued to Mrs. Hall a temporary

order of protection, which, among other provisions, directed Mr. Hall to remove himself from and to remain away from the Frederick Street address. (Ex. 1, sub. 2). Mr. Hall then retained the legal services of the Respondent. Mrs. Hall retained the services of Attorney David Brown.

Following a hearing on November 10, 1988, Judge Esworthy issued an order of protection requiring that Mr. Hall "shall not molest or harass the petitioner in any way, either physically or verbally and shall not harass her by telephone at her place of employment or at home." (Ex. 1, sub. 5). Mr. Hall re-occupied the marital home.

By summons dated November 8, 1988 and complaint dated November 17, 1988, Respondent, on behalf of James Hall started a divorce action against Linda Evelyn Hall. She appeared in the action by Attorney Brown who, on her behalf, filed a verified answer and counterclaim.

Following joinder of issue, Mrs. Hall sought and obtained an Order to Show Cause, returnable on February 23, 1989, seeking various relief, including "exclusive occupancy of the marital residence and the contents therein located at 47 Frederick Street, Johnson City, New York." (Ex. C). The matter came on to be heard on February 18, 1989, before the Honorable Robert E. Fischer, Supreme Court Justice.

Respondent Benjamin defended the application, objecting on the grounds that the issues involved had been fully resolved in the Family Court, although he could not produce any documentation to that effect at that time. The matter was adjourned for an evidentiary hearing and Justice Fischer so advised counsel by letter dated February 23, 1989, specifically directing Respondent Benjamin to produce the Family Court records by March 1, 1989. (Ex. 1, sub 9). This he did not do.

At the March 9, 1989 hearing, Respondents position, from what can be gleaned from the abridged transcript, being

Respondent's Exhibit "H", continued to be that the prior proceedings in Family Court had *res judicata* effect on the instant motion.

From the credible evidence before me, the assertion can only be described as specious. The evidence fails to show any conclusive determination in Family Court of the ultimate issues. Judge Esworthy's order of November 10, 1988, shows on its face that it was a limited order. It was to expire on November 10, 1989. (Exhibit 1, sub. 5). Furthermore the wording referring to Mrs. Hall uses the ambiguous words "at home." Which home, the marital residence owned by her, or wherever she might be residing?

SPECIFICATION 2.

The substance of this specification deals with a wrongful death action brought by Respondent on behalf of the estate of one Allan Debiaw against the Sheriff of Broome County, Anthony C. Ruffo. The action was started in early November of 1989.

In April of 1990, Respondent brought a motion before the Honorable Robert E. Fischer, Supreme Court Justice, to amend the complaint to include additional defendants and for other relief. The motion was heard on May 4, 1990 and the requested relief to add defendants was granted and an adjournment was taken for a further hearing on July 6, 1990.

By order of Justice Fischer dated December 2, 1990 (Ex. 1, sub. 15), the Court made certain determinations and directed Respondent to serve an amended complaint within twenty (20) days after service of the order. This the Respondent did not do, nor did he petition the Court to extend the time.

Rather, Respondent embarked upon a course of informal discovery and circulation among some defense counsel of a

"draft of a proposed second amended complaint." (Ex. 1, sub. 16). In an affidavit for Court use, sworn to on May 17, 1991 (Ex. 1, sub. 24), Respondent swore that the reason the amended complaint was not served as directed was that the parties had agreed among themselves to continue discovery. This was not true.

In mitigation, Respondent produced evidence that it was common practice in Broome County, and elsewhere, for attorneys to conduct informal discovery. That is undoubtedly true but is deemed inappropriate under circumstances that existed in the subject action.

SPECIFICATION 3.

This specification involves an action brought by Respondent in the Supreme Court, County of Broome, on behalf of one Charles Williams, as plaintiff, against Russell Jordan, Cecil Soules and Dwight Rhodes, as defendants. Defendants were employees of the State of New York at the Binghamton Psychiatric Center. The lawsuit sought various relief, including punitive damages against defendant Soules.

The action was initiated on or about November 6, 1989. The defendants appeared by the New York Attorney General, Mary A. Walsh, of counsel, who served an answer on or about November 27, 1989. On or about December 22, 1989, Attorney Terrence Dugan also appeared in the action on behalf of defendant Soules, the one against whom punitive damages were sought. Attorney Dugan simultaneously filed an answer and a demand for a Bill of Particulars upon plaintiff's counsel, the Respondent herein.

By letter dated December 26, 1989, Respondent sought from Attorney Dugan leave to extend the time to provide a Bill of Particulars "until after the State has made their Motions and a

decision has been rendered on same." (Ex. 1, sub. 37). Having personally determined from Attorney Walsh that no motions were pending or contemplated, Attorney Dugan so advised Respondent by letter dated December 28, 1989 and declined to grant an extension. (Ex. 1, sub. 38).

Respondent did not comply and further correspondence ensued on January 15, 1990, January 26, 1990 and March 27, 1990, seeking compliance. (HT pp. 43-45). Nothing was forthcoming. On or about March 30, 1990, Attorney Walsh filed a demand for a Bill of Particulars.

After that, there occurred a series of telephone calls and letters among Respondent, Attorney Dugan and Attorney Walsh over the course of about three months. The thrust of all of this was, to use the undersigned's words, "Mr. Benjamin, are you going to discontinue your action or are you going to provide the Bill of Particulars?"

With no positive response, Attorney Walsh initiated a Motion to Preclude on July 6, 1990. On or about August 1, 1990, Attorney Dugan filed a similar motion.

Respondent claims that on June 25, 1990 he mailed a "Stipulation Discontinuing Action" to Attorney Walsh, with a notation that a copy was going to Attorney Dugan. The testimony of Attorney Walsh denies receiving same until she received a letter dated August 6, 1990, enclosing a copy of the purported June 25, 1990 letter.

The undersigned discredits Respondent's claim. It is deemed significant that it was only after Attorney Walsh filed her Motion to Preclude on July 6, 1990 that the August 6, 1990 correspondence took place.

CONCLUSION

The actions and performance of Respondent in connection with the matters embraced within the subject Charge, when taken together, demonstrate a course of conduct on the part of Respondent intended to mislead, misguide, misinform, deceive, circumvent and confuse Court and counsel. The totality of the circumstances here manifest and make evident the violation of the type of misconduct contemplated by DR 1-102 (A)(4). The Charge and each of the Specifications are proved.

Dated: April 6, 1994

LISTON F. COON
Referee

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

IN THE MATTER

OF

RONALD R. BENJAMIN an Attorney and Counselor-at-Law

RONALD R. BENJAMIN,

Petitioner,

against

COMMITTEE ON PROFESSIONAL STANDARDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

Whether the public censure of an attorney based upon a finding that the attorney attempted to mislead a court, where the findings of fact are supported by the evidence, violates the attorney's First Amendment rights and impermissibly limits his ability to vigorously advocate his client's position in a case?

Whether the public censure of an attorney has an impermissible chilling effect and deprives the attorney of his right to petition the government for redress of grievances, when the disciplinary process was initiated by a judge after that judge granted the attorney's motion the judge recuse himself from a case in which the attorney appeared, when the attorney has failed to set forth any proof that the judge who initiated the disciplinary process did so as a retaliatory act?

Parties to the Proceeding

The parties to the proceeding below were Petitioner Ronald R. Benjamin (captioned Appellant below), and Respondent Committee on Professional Standards of the State of New York Supreme Court, Appellate Division, Third Judicial Department (captioned Respondent below).

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[1] Throughout his Petition, petitioner appears to have erroneously cited this case as 129 AD2d 886; the citation for a 1987 New York State Supreme Court, Appellate Division, Third Judicial Department, disciplinary decision where after a finding of attorney misconduct petitioner was suspended from the practice of law in New York State for six months.

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No. 94-1568

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

In The Matter

of

RONALD R. BENJAMIN an Attorney and Counselor at Law

RONALD R. BENJAMIN,

Petitioner,

against

COMMITTEE ON PROFESSIONAL STANDARDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

Statutes Involved

In addition to those constitutional and statutory provisions cited by the petitioner, respondent submits the following to this Court:

Rules of the Supreme Court, Appellate Division, Third Judicial Department, Part 806. Conduct of Attorneys of Title 22 of New York Codes, Rules and Regulations [NYCRR]: 22 NYCRR §806.4

806.4 Procedure

(a) Investigation generally. Investigation of professional misconduct may be commenced by the committee, through the chief attorney, upon receipt of a specific complaint or by the committee on its own motion. Complaints must be in writing and signed by the complainant, but need not be verified. Prior to initiating an investigation on its own motion, the committee shall file as part of its record a written inquiry signed by the chief attorney, which inquiry shall serve as the basis for such investigation.

(b) Investigation by Chief Attorney. Before initiating an investigation of a specific complaint against an attorney, the chief attorney shall determine whether the allegations, if true, are sufficient to establish a charge of professional misconduct. If deemed sufficient, the chief attorney shall forward a copy of the complaint to the attorney, together with a statement of the nature of the alleged professional misconduct and a request that the attorney furnish a written statement concerning the complaint, and shall advise the attorney that a copy of his statement may, in the discretion of the committee, be furnished to the complainant for reply. Attorneys shall be expected to cooperate with all investigations. As part of an investigation, the chief attorney may request an attorney to appear pursuant to written notice to be examined under oath by the chief attorney or a staff attorney, and may, when necessary, apply pursuant to subdivision (e) of this section for a subpoena directing the attorney to appear for such examination. Stenographic minutes of such exami-

nation shall be made and a transcript made available to the attorney upon his request and payment of the stenographic fees. If an attorney requests that an examination be conducted before a third person, the chairman of the committee shall designate a member of the committee as the person before whom the examination shall be held. Upon the conclusion of an investigation, the chief attorney shall make a report to the committee. An attorney who fails to comply with a subpoena directing him to appear for examination may, in the court's discretion, be suspended pending his compliance or until further order of the court.

(c) Action by Committee.

(1) If, after an investigation, the committee determines that no further action is warranted, the complaint shall be dismissed and the complainant and the attorney shall be so notified in writing; or, if the investigation was undertaken on the committee's own motion, the investigation shall be discontinued. If, after an investigation, the committee determines that a complaint warrants action, it may:

(i) direct that a disciplinary proceeding be commenced against the attorney; or

(ii) admonish the attorney, either orally or in writing, or both, if the acts of misconduct have been established by clear and convincing evidence and the committee determines in its discretion in light of all of the circumstances that the misconduct is not serious enough to warrant prosecution of a disciplinary proceeding; or

(iii) issue a letter of caution, if the acts of misconduct have been so established and the committee determines in its discretion in light of all the circumstances that the misconduct is not serious enough to warrant either prosecution of a disciplinary proceeding or imposition of an admonition; or

(iv) issue a letter of education, if the committee determines, in its discretion, that the actions of the attorney warrant comment.

(2) Prior to imposition of an admonition, the committee shall give the attorney 20 days' notice by mail of the committee's proposed action. If the attorney desires to challenge the committee's action, the attorney may demand that the committee institute a disciplinary proceeding. Such demand shall be made by letter, certified mail, return receipt requested, within 10 days from the date of mailing the notice of the committee's proposed action. In the event that the attorney makes no such demand, the committee may proceed with the admonition. In any disciplinary proceeding instituted pursuant to this paragraph, the court shall not be bound by the committee's determination to admonish the attorney but may impose such discipline as it determines to be warranted by the facts.

(3) No prior notice to the attorney is necessary for the issuance of a letter of caution. The attorney may, however, request reconsideration of the committee's action in issuing a letter of caution. Such request shall be made by letter, certified mail, return receipt requested, within 10 days from the date of the mailing of the committee's letter. The request shall be considered by a subcommittee consisting of the chairman and two other committee members designated by the chairman. If it is determined by a majority of the subcommittee that reconsideration is warranted, the matter shall be resubmitted to the committee. Upon reconsideration, the committee shall not be bound by its prior determination but may take such action, including imposition of a more severe sanction or institution of a disciplinary proceeding, as the committee may determine.

(4) When an attorney has been admonished or cautioned, the committee shall promptly notify the complainant of the action taken. The committee's records relating to its investigation and sanction shall be confidential. An admonition or letter of caution may be considered by the court and the committee in determining whether to impose

discipline and the extent of discipline to be imposed in the event other charges of misconduct are brought against the attorney.

Statement of the Case

Petitioner is an attorney who was publicly censured by the New York State Supreme Court, Appellate Division, Third Judicial Department[2], for attempting to mislead a trial court "by asserting a specious res judicata or a collateral estoppel defense on behalf of a client in the context of a divorce proceeding (specification 1) and by inaccurately asserting in a sworn affidavit that he had failed to timely serve an amended complaint in a wrongful death action because the parties had agreed among themselves to discontinue discovery so that the amended complaint, when served, would not require additional amendments (specification 2). The affidavit was made in support of a motion to file a late amended complaint. Respondent later admitted that there was no express agreement among the parties to continue discovery." *Matter of Benjamin*, 205 AD2d 978 (3rd Dept. 1994) (Pet.App. at 5a-8a)[3].

This disciplinary proceeding arose in part from an action entitled *Hall v. Hall,* brought before New York State Supreme Court Justice Robert E. Fischer by order to show cause, dated February 9, 1989, returnable on February 18, 1989. Linda Hall sought exclusive occupancy of the parties' marital residence. Petitioner represented James Hall, the responding party in the matrimonial proceeding. On the February 18, 1989 return date, during a hearing before Justice Fischer, *petitioner asserted that the occupancy issue before Supreme*

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[2] Hereinafter, the New York State Supreme Court, Appellate Division, Third Judicial Department, will be referred to as the Appellate Division, Third Judicial Department.

[3] Petitioner's Appendix will be cited in this brief as "Pet. App."

Court had been fully resolved in Family Court and that Family Court's determinations had res judicata *effect on the instant proceeding*. Justice Fischer directed petitioner to produce the Family Court papers to support his *res judicata* assertion.

By letter dated February 21, 1989, petitioner provided Justice Fischer with Mr. Hall's affidavit in opposition to the order to show cause, dated February 17, 1989, which was drafted by petitioner. In paragraph number 5, Mr. Hall asserted "that the allegations and issues raised herein are identical to the ones adjudged by Judge Esworthy and that his Decision is res judicata." In paragraph number 16, Mr. Hall asserted "I, therefore, submit that in addition to this matter being res judicata that I simply never engaged in any conduct physically hitting or otherwise causing my wife any fear..."

At the March 9, 1989 hearing, petitioner conceded that he had not supplied Justice Fischer with the requested documentation by the March 1, 1989 deadline. During the hearing, petitioner produced documentation in an attempt to support his contention that Mrs. Hall's allegations of physical abuse had been adjudicated in Family Court and determined not to have occurred. This documentation was comprised of Family Court Judge Joseph Esworthy's November 7 and 10, 1988 orders of protection against Mr. Hall. The November 7, 1988 order directed Mr. Hall not to harass Mrs. Hall and to remain away from the marital residence. The November 10, 1988 order directed Mr. Hall not to harass Mrs. Hall, without any mention of remaining away from the marital residence.

At the March 9, 1989 hearing, Justice Fischer questioned petitioner on his assertion that Family Court proceeding had *res judicata* effect on Supreme Court, as none of the documents produced addressed or resulted in determinations of exclusive occupancy or ownership of the marital residence. Petitioner asserted that he had misspoken and he merely meant to convey that Mrs. Hall was collaterally estopped from re-litigating the issue of physical abuse.

The second matter addressed in the disciplinary proceeding began on November 3, 1989, when a wrongful death action entitled *Debiaw v. Ruffo, et. al.*, was commenced before Justice Fischer. Petitioner represented Deborah Debiaw, the widow and executrix of Allan G. Debiaw, a truck driver who died after being removed from his tractor-trailer following an accident. Initially, the action was brought against Broome County Sheriff Anthony C. Ruffo alleging that a policy of favoritism in the selection of tow truck operators delayed Mr. Debiaw's rescue. Petitioner moved to amend the complaint in or about April, 1990, to add eight additional defendants and expand his claim from two to twenty causes of action. Justice Fischer granted petitioner's motion to amend the complaint to add eight defendants, reserving decision on the remaining issues pending a hearing. A hearing was held on July 6, 1990 to address the additional claims, allowing defense counsels an opportunity to be heard. By decision dated December 3, 1990, petitioner was allowed to add the additional defendants and causes of actions, and was ordered to serve the "Amended Complaint, in form and amended in conformance with this Order, upon counsel for the respective defendants within twenty (20) days after the service of a copy of this Order duly entered."

Rather than serve the amended complaint in accordance with the Court's order, petitioner provided opposing counsels with a draft of an amended complaint he termed a "proposed second Amended Complaint" by letter dated December 14, 1990. Between January and March, 1991, petitioner made discovery requests and conducted depositions of two employees of the Broome County Department of Emergency Services. Although petitioner supplied opposing counsels with copies of several proposed amended complaints, he failed to comply with the December 3, 1990 order directing him to serve the amended complaint, amended in conformance with the order, upon defendants' counsels within twenty days after the service of the Order.

On March 22, 1991, petitioner moved to further amend the complaint. After receiving defense counsels' cross-motions, oral argument was held on the various motions on May 10, 1991.

Petitioner responded to defense counsels' arguments in a sworn affidavit, dated May 17, 1991, wherein he asserted in paragraph 29 "*your deponent respectfully submits that the reason the Amended Complaint was not timely filed was that the parties had agreed among themselves to continue the discovery to develop additional facts so that when the Amended Complaint was served it would not need future amendments.*" (Emphasis Added)

At a June 7, 1991 appearance, petitioner admitted that his statement contained in the May 17, 1991 sworn affidavit was not true. Petitioner stated "*I agree that there was no formal agreement with anyone about that is what we were doing.*" At the same appearance he later admitted "*There was no express agreement between counsel to not timely serve the amended complaint, which should have been served about December 26 or so.*" (Emphasis Added)

By letter dated July 1, 1992, Justice Fischer filed a written inquiry with respondent alleging petitioner had committed attorney misconduct, specifically asserting that in four matters pending before Justice Fischer, petitioner had made untrue assertions. 22 NYCRR §806.4(a) Following respondent's investigation of Justice Fischer's allegations, respondent determined that petitioner's conduct violated New York's Disciplinary Rule 1-102(A)(4), prohibiting a lawyer from "[e]ngag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation" and pursuant to the provisions of 22 NYCRR § 806.4 he should receive a letter of admonition. By letter dated May 10, 1993, petitioner was advised of respondent's intention to issue a letter of admonition, unless within ten days he rejected the proposed discipline and demanded the institution of a disciplinary proceeding pursuant to 22 NYCRR § 806.4 (c)(2) By letter dated May 20, 1993, petitioner requested an opportunity to appear before respondent's Executive Committee to request reconsideration of the proposed letter

of admonition. Following petitioner's May 27, 1993 appearance before respondent's Executive Committee, by letter dated June 7, 1993, petitioner was advised of respondent's intention to issue the letter of admonition unless within 10 days from the date of that letter, petitioner demanded the institution of a disciplinary proceeding. By letter dated June 14, 1993, petitioner demanded that respondent institute a disciplinary proceeding as he would not accept the letter of admonition.

A petition of charges containing one charge and three specifications, verified July 6, 1993, was served upon petitioner. An answer was served by petitioner, verified July 27, 1993. An amended answer was served by petitioner, verified September 30, 1993. By order of the Appellate Division, Third Judicial Department, dated September 16, 1993, respondent's motion for referral to a fact finding referee was granted. Issues raised by petitioner's answer were referred to the Honorable Liston F. Coon, retired Schuyler County Court Judge, to take testimony and report his findings thereon to the Appellate Division, Third Judicial Department. The hearing was commenced before Judge Coon on October 19, 1993, continued on November 16, 1993, and concluded on December 2, 1993. Various witnesses, including Justice Fischer, testified during the hearing.

During the disciplinary proceeding before Judge Coon, petitioner testified, relative to the *Hall* matter, that he did not specifically recall what occurred or what he said at the February 18, 1989 appearance. "...I think we may have went there and a hearing was scheduled. I don't recall that there was any testimony taken. Affidavits were submitted and the Judge said he scheduled it. But that, you know, I can't remember that stuff."[4] During the disciplinary proceeding Mr. Hall testified that petitioner had represented him in 1988 and 1989 in

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[4] In his Petition, petitioner fails to make any reference to his February 18, 1989 appearance. He incorrectly asserts that the first appearance on the order to show cause was March 9, 1989.

matters before Family Court and Supreme Court. Mr. Hall testified that the above-mentioned affidavit in opposition to the order to show cause was prepared by petitioner after he had spoken with Mr. Hall. When asked whether he had advised petitioner that the Family Court decision had *res judicata* effect on Supreme Court, he testified that he did not know what the words *res judicata* meant.

Relative to the *Debiaw* matter, although petitioner's expert witness testified that it was common practice to engage in informal discovery in Broome County, New York, where petitioner practices, he conceded that discovery, such as the depositions held in this matter should have been conducted on notice to all parties. Petitioner failed to put all parties on notice of the ongoing discovery. Some defense counsels were not given an opportunity to agree to foregoing service of an amended complaint in lieu of informal discovery.

In his April 6, 1994 Referee's report Judge Coon found that petitioner had engaged in a course of conduct "intended to mislead, misguide, misinform, deceive, circumvent and confuse court and counsel. The totality of the circumstances here manifest and make evident the violation of the type of misconduct contemplated by D[isciplinary] R[ule] 1-102 (A)(4)." (Pet.App. at 9a-15a). Respondent moved to confirm the Referee's report by motion dated April 19, 1994. By motion dated May 26, 1994, petitioner moved to deny confirmation of the referee's report and to dismiss the petition of charges. By memorandum and order of the Appellate Division, Third Judicial Department, dated June 24, 1994, the Court found that petitioner had engaged in misleading conduct as set forth in Specifications 1 and 2 of the petition of charges' sole charge. The Court rejected the third specification. (Pet.App. at 5a-8a). Petitioner's appeal to the New York Court of Appeals was dismissed on September 22, 1994 on the ground it did not raise a substantial constitutional issue. (Pet.App. at 3a-4a). A motion to the New York Court of Appeals seeking discretionary review was denied on December 22, 1994. (Pet.App. at 1a-2a).

Summary of the Argument

A finding that petitioner had engaged in misleading conduct toward a court by making a verbal and a written sworn statement without any reasonable basis to believe the statements were true and possessing first hand knowledge that the statements were not true following a fact finding hearing, which resulted in the imposition of a public censure, did not violate petitioner's First Amendment rights or hinder his ability to zealously represent clients.

The disciplinary proceeding commenced against petitioner, resulting from an inquiry filed by a judge whom petitioner had attempted to mislead by making untrue assertions, was not an improperly brought, retaliatory act, because the filing of the inquiry was justified by petitioner's conduct. Petitioner has failed to set forth any proof that the judge acted in a retaliatory manner or that his First Amendment rights were violated.

REASONS FOR DENYING THE WRIT

I.

The imposition of a public censure based on a finding that an attorney attempted to mislead a court, where supported by the evidence, does not violate the attorney's First Amendment rights.

A. The New York Supreme Court, Appellate Division, Third Judicial Department's Finding of Misconduct and Imposition of Discipline Was Warranted by the Facts.

Petitioner's first question presented asserts that there was insufficient proof for the findings made and the conclusions drawn. Specifically, petitioner asserts that there was insufficient proof for Judge Liston Coon, the fact finding referee, and the Appellate

Division, Third Judicial Department, to find he violated New York's Disciplinary Rule 1-102 (A)(4) which provides that "[a] lawyer shall not:... [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation". The inquirer herein, Supreme Court Justice Robert E. Fischer, testified at length on November 16, 1993, before Judge Coon, detailing petitioner's misleading and deceitful conduct.

Addressing the *Hall* matter, Justice Fischer testified that at the February 18, 1989 hearing before him, commenced by counsel opposing petitioner's client, and brought on by order to show cause seeking exclusive occupancy of a marital residence, petitioner stated that the occupancy issue before Supreme Court had been fully resolved in a prior Family Court proceeding and that Family Court's determination had *res judicata* effect on the instant proceedings.

> Justice Fischer: At the argument, Mr. Benjamin asserted that this matter that had been brought on for determination by me had been fully resolved in the Family Court, in a Family Court hearing, and it was res judicata or this court in which I was sitting was collaterally estopped from considering the issue.

After petitioner failed to timely comply with Justice Fischer's directive that he provide documentary proof of the Family Court determination and its alleged *res judicata* effect, at a March 9, 1989 hearing, Justice Fischer questioned petitioner regarding his assertion, as none of the documentation provided addressed or resulted in determinations as to exclusive occupancy or ownership of the marital residence. The Family Court proceeding had resulted in the issuance of an order of protection against petitioner's client. At the March 9, 1989 hearing, petitioner asserted that he must have misspoken at the earlier appearance. The relevant portion of the March 9, 1989 hearing transcript is reproduced in the Petition, pages 12-14.

In his Petition, petitioner fails to mention his February 18, 1989 appearance before Justice Fischer wherein he made the misleading statement in the *Hall* matter. Other than referencing his previous

attempts to excuse the misleading statement, petitioner fails to provide any new explanation for his baseless assertion. In petitioner's testimony during the proceeding before Judge Coon, he asserted a lack of recollection of what transpired during the February 18, 1989 appearance. He did not deny the statements attributed to him by Justice Fischer and he should be precluded from doing so here.[5]

No reasonable interpretation of the substance and result of the prior Family Court proceeding could justify petitioner's assertion, as testified to by Justice Fischer, that the matter brought before Justice Fischer by order to show cause seeking exclusive occupancy of the marital residence was "fully resolved," "was *res judicata*" and Justice Fischer's court "was collaterally estopped from considering the issue."

Addressing the *Debiaw* matter, Justice Fischer testified that after petitioner filed his May 17, 1991 sworn affidavit asserting that he had failed to comply with Justice Fischer's order to file an amended complaint within twenty days of that order because "the parties had agreed among themselves to continue discovery", petitioner at a June 7, 1991 appearance, admitted the May 17, 1991 affidavit's sworn statement was not true. The relevant portion of the June 7, 1991 hearing transcript is reproduced in the Petition, pages 16-17.

Here, the documentary evidence coupled with Justice Fischer's testimony established that petitioner's sworn statement was untrue and intended to mislead the court.

---

[5] When considered along with the statements attributed to petitioner on February 18, 1989, the 1988 Family Court orders referred by petitioner support the Appellate Division, Third Judicial Department's finding of misconduct.

The testimony of the various witnesses adduced during the three days of the fact finding hearing, as well as the documentary evidence introduced, provided Judge Coon with a reasonable basis for his findings of fact (Pet.App. 9a-15a). The Appellate Division, Third Judicial Department, following its own review of the case based upon the entire record, appropriately confirmed two of the three specifications contained in respondent's petition of charges.[6] (Pet.App. 5a-8a)

A court's deference to the fact finders' determination on the issue of credibility is predicated upon the common sense notion that the referee who observes the witnesses and hears the testimony is in a special position to evaluate and integrate that evidence with other facts before him. *Matter of von Wiegen,* 146 AD 2d 901 (3rd Dep't 1989), *lv. denied,* 74 NY2d 603 (1989); *Matter of Berenhaus v. Ward,* 70 NY2d 436, 443 (1987).

In *Matter of Holtzman,* 78 NY2d 184, 190 (1991), *cert. den.*, 502 US 1009 (1991), the New York Court of Appeals held that findings of fact were binding upon the Court of Appeals where the findings were supported by the record below. This Court declined to review that matter.

B. The New York Supreme Court, Appellate Division, Third Judicial Department's Imposition of a Public Censure Did Not Violate Petitioner's First Amendment Rights.

Although petitioner was unsuccessful in his requests for appellate review by the New York Court of Appeals, longstanding precedent has established that the power and discretion of the Appellate

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[6] It cannot and is not argued that the Appellate Division, Third Judicial Department, did not afford petitioner a complete review of the record which included disaffirming a portion of the Referee's report as it pertained to specification 3 of the petition of charges.

Division's, in imposing discipline on attorneys is not subject to review by the Court of Appeals. *See, Matter of Goodman,* 199 NY 143 (1910); *In Re Robinson,* 209 NY 354 (1913); *In Re Flannery,* 212 NY 610 (1914).

In *In Re Axtell,* 257 NY 210 (1931), the Court of Appeals reiterated its position that the Appellate Division that pronounces the sentence has jurisdiction exclusive of any other. The Court specifically provided that "the members of the New York State Supreme Court and the Appellate Division of that court has exclusive jurisdiction to say what constitutes professional misconduct on their part, ... moreover the punishment that is to follow must be determined by the Appellate Division and is not subject to revision even in this court". This Court has declined to review such matters. *Erie County Water Auth. v. Western New York Water Co.,* 304 NY 342, 346 (1952), *cert den.* 344 US 892 (1952). The Court of Appeals reaffirmed this principle in subsequent decisions. *Matter of Baker,* 28 NY2d 977 (1971), *cert. den.,* 404 US 915 (1971); *Matter of Kelly,* 23 NY2d 368, 384 (1968).

Contrary to Petitioner's assertion that the New York courts have failed to consider his Constitutional claim, his First Amendment concerns were raised and considered by the Appellate Division, Third Judicial Department. As this Court noted in *Middlesex County Ethics Committee v. Garden State Bar Assoc.,* 457 US 423, 435 (1982), the states are capable of considering federal constitutional challenges. In petitioner's May 26, 1994 motion to deny confirmation of Judge Coon's April 6, 1994 report and dismiss the petition of charges, he raised the substance of his constitutional challenges. The Appellate Division, Third Judicial Department, following a review of the entire record confirmed the referee's report as to two of three specifications. The New York Court of Appeals examined petitioner's constitutional claim upon a review of the record as put forth by petitioner, and dismissed petitioner's appeal "upon the ground that no substantial constitutional question is directly involved." (Pet.App. 3a-4a)

C. The New York Supreme Court, Appellate Division, Third Judicial Department's Imposition of a Public Censure Was an Appropriate Sanction and Within Its Discretion.

Petitioner's first question presented and his argument in support thereof, question the appropriateness of the censure imposed by the Appellate Division, Third Judicial Department. It is respectfully noted that the Court below considered both mitigating and aggravating factors as set forth in the decision, before imposing discipline, including petitioner's disciplinary history. The referee's findings individually and collectively support the Appellate Division's sanction of censure and should not be disturbed.

As stated by the New York Court of Appeals in *In re Flannery:*

> It is not for us, where opposing inferences may be drawn, to determine which we shall accept and which reject. It is not for us to revise the measure of punishment which guilt, when adjudged, is to entail. In establishing the standard of conduct to which the bar must at its peril, conform, the Appellate Division has a wide discretion, which we have neither the wish nor the power to interfere... We have no right to say, where any measure of blame attaches to the offense, that the standard has been set too high. 212 NY at 611.

Further, in *Matter of Goodman,* the same Court noted:

> In a proceeding of this character the power to review ends in this court when it appears that the proceeding has been instituted and conducted in accordance with the statutes and rules authorizing it; that no substantial legal right of the accused has been violated; that no prejudicial error has been committed in the reception or exclusion of testimony; and that there is some evidence to sustain the finding upon which the order is based. Further we cannot go, for the power and discretion of the Appellate Division in the infliction of

> punishment when guilt is established are not subject to review in this court. 199 NY at 144-145.

The Court of Appeals has noted "that 'it is difficult, if not impossible, to enumerate and define with legal precision, every offense for which an attorney... ought to be removed'... [b]road standards governing professional conduct are permissible and indeed often necessary." To find broad standards "impermissibly vague" would make it futile to promote such general guidelines. "Rather than an absolute prohibition on broad standards, the guiding principle must be whether a reasonable attorney familiar with the Code... would have notice of what conduct is proscribed." *Matter of Holtzman,* 78 NY2d 184, 190-191; *Matter of Cooperman,* 83 NY2d 465, 475 (1994).

Petitioner's reliance upon *Matter of Altomerianos,* 106 AD2d 96 (1st Dept. 1990), to suggest that the Appellate Division, Third Judicial Department's imposition of a censure was inappropriate is misplaced. In Altomerianos, the court drew a distinction between intentional and unintentional conversions, where the court found that an attorney unintentionally converted client funds, noting that charges of violating Disciplinary Rule 1-102(A)(4) should be reserved to instances where there is fraudulent conduct and such a violation "generally warrants disbarment." *Id.* at 102. The Appellate Division, First Judicial Department's holding does not require disbarment for all New York Disciplinary Rule 1-102(A)(4) violations, nor is it binding authority upon the Appellate Division, Third Judicial Department.

II.

The underlying proceedings were appropriate as there was no basis to assert that the Supreme Court justice who filed the complaint did so as a retaliatory act.

Petitioner failed to set forth supporting facts or law to sustain his empty allegation that Supreme Court Justice Fischer filed his inquiry against him in retaliation for petitioner filing a request that Justice Fischer recuse himself from various matters where petitioner represented a party before him.

Conclusion

For the reasons set forth above, the Petition should be denied.

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